

VIA HAND DELIVERY

March 5, 2003

EX PARIE

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


Re: Notice of Oral *Ex Parte* Presentation
CC Docket Nos. 01-337; 02-33, 98-10, 95-20

Dear Ms. Dortch:

On March 4, 2003, Dave Baker, Vice President for Law and Public Policy. EarthLink, and the undersigned met with Lisa Zaina. Senior Legal Advisor to Commissioner Adelstein. During the meeting, EarthLink generally described its ISP business, its approximately 800,000 broadband subscribers (of which about half are DSL-based using BOC and Covad DSL services), and reiterated several points that it made in previously filed comments, reply comments, and *ex parte* presentations in the above-referenced dockers.

In EarthLink's view, the Commission should retain Title II jurisdiction of ILEC-provisioned wholesale DSL and should continue to apply *Computer Inquiry* principles to ensure nondiscriminatory access to such telecommunications services for independent ISPs. While EarthLink has suggested ways of updating and streamlining Computer III obligations, the BOCs have presented no substantial reason for the elimination of the access principles of *Computer III*. Moreover, in today's current regulatory and market environment, *Computer III* rules are not a disincentive for the BOCs to invest in broadband facilities and services. Indeed, BOC DSL services operate on existing "old wires" copper infrastructure. Should the public interest warrant deregulation, EarthLink believes that the Communications Act demands the BOCs present a specific showing for specific regulatory relief. and not whole cloth reclassification under Title I, which would add additional legal uncertainty to ISP access rights.

Nondiscrimination requirements are critically important for independent ISPs to continue offering consumers choices of ISP features and functionalities that are distinct from BOC ISP offerings. While BOCs currently provide the vast majority of DSL-based high-speed Internet access to residential consumers: EarthLink provides many distinct features including privacy functions, anti-spam and pop-up protections, and remote access. Hundreds of thousands of consumers today rely on independent ISP broadband services today, and a radical departure from

 **Lampert & O'Connor, P.C.**

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existing access rights is not only unwarranted under the law, but would threaten the continuing service to those consumers. The BOCs have failed to present how ISPs with existing service arrangements would be adequately treated under a private carriage scheme. EarthLink agrees with the policy premise in this case that deregulation should follow the emergence of actual viable competitive platforms, and the current monopoly or duopoly markets are not sufficient.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, eight copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,



Mark J. O'Connor
Counsel for EarthLink, Inc

CC: Lisa Zaina